

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FRED V. BRUNER,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-13-691-D
)	
NICOLE S. CABLE, <i>et al.</i> ,)	
)	
Defendants.)	

ORDER

This matter is before the Court for review of the Report and Recommendation issued by United States Magistrate Judge Shon T. Erwin pursuant to 28 U.S.C. § 636(b)(1)(B)-(C). Upon initial screening of the Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, as required by 28 U.S.C. § 1915A, Judge Erwin recommends the dismissal with prejudice of Plaintiff's action against Defendant Oklahoma Department of Corrections, and any official-capacity suit against the individual defendants,¹ and the dismissal without prejudice of Plaintiff's action against Defendants Nicole S. Cable, Brad Brogdon, and Michael Dunkle pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1), for failure to state a claim upon which relief can be granted. Judge Erwin also recommends that the dismissal should count as one "prior occasion" or "strike" under 28 U.S.C. § 1915(g) when it becomes final, and that Plaintiff's pending motions should be denied as moot.

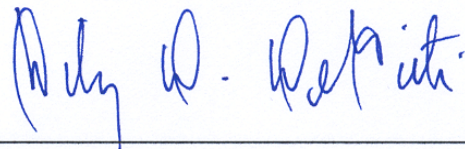
Plaintiff, who appears *pro se* and *in forma pauperis*, has neither filed a timely objection to the Report nor requested additional time to object. The Court therefore finds Plaintiff has waived

¹ Judge Erwin correctly finds that neither a state agency nor a state official is a "person" within the meaning of 42 U.S.C. § 1983, and cannot be sued under that statute. Judge Erwin incorrectly finds that the state's Eleventh Amendment and sovereign immunity also warrant a dismissal with prejudice; immunity deprives a court of jurisdiction and would require a dismissal without prejudice. *See, e.g., Lujan v. Regents of University of Calif.*, 69 F.3d 1511, 1522-23 (10th Cir. 1995).

further review. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *see also United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Further, the Court concurs in Judge Erwin's recommendations to dismiss the action and deny all pending motions.

IT IS THEREFORE ORDERED that the Court adopts the Report and Recommendation [Doc. No. 10] and orders as follows: the Complaint is dismissed with prejudice as to the Oklahoma Department of Corrections and state officials; the Complaint is dismissed without prejudice as to all individual defendants; Plaintiff's Motion to Request Record [Doc. No. 3] and Motion to Request Transcript [Doc. No. 4] are denied; and this dismissal shall count as a "prior occasion" pursuant to 28 U.S.C. § 1915(g) after Plaintiff has exhausted or waived his right to appeal. A separate judgment shall be entered accordingly.

IT IS SO ORDERED this 10th day of September, 2013.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE